IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 59 OF 2000

MRS. MARIANINHA FERNANDES VAZ,
R/O. E-239, MACHADO VADDO,
CARANZALEM, ILHAS, GOA. ..... APPELLANT

VERSUS

1. MR. PETER FERNANDES,
R/O. MACHADO VADDO,
CARANZALEM, ILHAS, GOA.

2. MRS. IRENE CAIADO FERNANDES,
R/O. MACHADO VADDO,
CARANZALEM, ILHAS, GOA. ..... RESPONDENTS

SHRI E. DIAS, ADVOCATE FOR THE APPELLANT.

SHRI PARAG S. RAO, ADVOCATE FOR THE RESPONDENTS

CORAM : **N. A. BRITTO, J.**

DATE : **24/11/2005**

ORAL JUDGMENT

This is Plaintiff's Second Appeal, arising from Special Civil Suit No.129 of 1989/A and was admitted by order of this Court dated 8/9/2000 on several questions, as substantial questions of law, involved in this Second Appeal.

2. At the time of hearing Shri Rao, the learned Counsel on behalf of the Respondents/Defendants, raised a point of non maintainability of this

Second Appeal submitting that the Second Appeal is maintainable only against a decree a 'Decree' as defined Under Section 2(2) read with Section 100 of Civil Procedure Code. In support of his submission Shri Rao has relied upon the case of ***Madan Naik*** *Versus* ***Mst. Hansubala Devi & others*** (AIR 1983 SC 676).

3. It may be stated that the plaintiff no.1 is the sister of defendant no.1. They were the owners of a Mundkarial house bearing number E-239, situated in Survey number 43/5 of village Taleigao, which they subsequently purchased jointly by deed dated 23/1/1987. As relations between them got strained, plaintiff no.1 filed the suit and subsequently got her husband/plaintiff no.2 impleaded in the suit. The said husband, namely plaintiff no.2 expired on 21/1/1998 and the plaintiff no.1 filed an application dated 9/9/1998 to bring on record her son and daughter in place of plaintiff no.2. The said application was objected by the defendant vide their reply dated 20/11/1998, whereupon the plaintiff no.1 filed another application dated 26/11/1998 for condonation of delay.

4. The learned trial court vide order dated 26/2/1999 referred to the case of ***Mr. Paul Pinto & Others*** *versus* ***Mrs. Susheela Chandrakant Raikar*** (1997(2) GLT 19), but came to the conclusion that as the application to bring legal heirs on record by the plaintiffs was filed after seven months of the death of the plaintiff no.2 and the application for condonation of delay was filed later by 76 days, the said applications deserved to be dismissed and

consequently the trial court held that upon the death of plaintiff No.2, the suit itself was abated.

5. The plaintiffs carried an appeal to the District Court and the learned Additional District Judge by her order dated 4/11/1999 endorsed the findings of the trial court.

6. The Apex Court in part eight of the judgment in the case of ***Madan Naik*** *(supra)* has stated that Section 2(2) of C.P.C. defines "Decree" to mean "the formal expression of an adjudication, which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include any adjudication from which an appeal lies as an appeal from an order". When an appeal abates for want of substitution as envisaged by sub-rule (1) of Rule 9 of Order 22, it precludes a fresh suit being brought on the same cause of action. It is a specific provision. If abatement implied adjudication on merits, Section 11 of C.P.C. would be attracted. Abatement of an appeal does not imply adjudication on merits and hence specific provision had to be made in Order 22, Rule 9 (1) that no fresh suit could be brought on the same cause of action. Therefore when the appeal abated there was no decree, disposing of the first appeal, only course open is to move the court for setting aside abatement. An order under Order 22 Rule 9

(2) C.P.C. refusing to set aside abatement is specifically appealable under Order 43, Rule 1(k). Such an adjudication if it can be so styled would not be a decree as defined in Section 2(2) of C.P.C. Section 100 provides for second appeal to the High Court from every decree passed in appeal by any Court subordinate to the High Court on the grounds therein set out. What is worthy of notice is that second appeal lies against a decree passed in appeal. An order under Order 22, Rule 9 appealable as an order would not be a decree and therefore, no second appeal would lie against that order. Such an appeal is liable to be rejected as incompetent.

7. The plaintiffs having filed an appeal before the District Court against the order of the Trial Court as an appeal against an order, the matter ought to have ended at that. Faced with the pronouncement of the Supreme Court in the case of ***Madan Naik*** *(supra)*, learned Advocate Shri Dias first submits that second appeal was entertained in ***Paulo Pinto and Others*** *(supra)*. If that is so it is because the point of maintainability of the second appeal was not raised. Shri Dias then fairly concedes the legal position set out in ***Madan Naik*** *(supra)* and craves leave to withdraw this Second Appeal with liberty to file a Writ Petition. Shri Rao has no objection for withdrawal of the appeal.

8. Consequently this Second Appeal stands dismissed as withdrawn with liberty as aforesaid.

9. The order of this Court dated 17/1/1005 shall continue to operate for a period of four weeks. Certified copies filed by the Plaintiff/Appellant to be returned on condition that they are replaced by xerox copies of the same.

N.A. BRITTO, J.

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